Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Access Charge Reform	)	**CC Docket No. 96-262**
	)	
Price Cap Performance Review for Local Exchange Carriers	)	**CC Docket No. 94-1**
	)	
Transport Rate Structure and Pricing	)	**CC Docket No. 91-213**
	)	
End User Common Line Charges	)	**CC Docket No. 95-72**
	)	
AMERICA'S CARRIERS TELECOMMUNICATION ASSOCIATION ("ACTA"),	)	
Petitioner	)	
	)	
	)	

To the Commission:

PETITION FOR EXPEDITED RECONSIDERATION

America's Carriers Telecommunication Association ("ACTA"), by its attorneys, submits this Petition for Expedited Reconsideration of portions of the Commission's Order in the above-captioned proceedings pursuant to Section 1.429 of the Commission's Rules. In support of this petition, the following is shown.

I. INTRODUCTION

ACTA is a national trade association with over 200 members including competitive interexchange service providers ("IXCs") providing telecommunications services on an interstate, international and intrastate basis to the public-at-large. Some of its members also act as underlying

(or wholesale) carriers providing network facilities, equipment and services to other member carriers thereby allowing telecommunications services to be resold to the public.

ACTA respectfully requests that the Commission reconsider certain aspects of its access reform order on an expedited basis for the following reasons. According to the Commission's Order, the Primary Interexchange Carrier Charge ("PICC") for multi-line business customers will be $2.75 per line starting on January 1, 1998. This PICC has the potential to increase by $1.50 per line per year after its initiation. The PICC is designed to be a per-line cost incurred by IXCs. Many of ACTA's IXC members are small to medium-sized carriers that have specifically, and sometimes exclusively, targeted multi-line businesses as customers. Imposition of this new regime upon ACTA's members will cause them severe and irreparable harm. Additionally, the Commission's abolition of the unitary price option for tandem-switched transport users and its net 400% increase in the tandem switching charge will put many of ACTA's members at an insurmountable competitive disadvantage and cause many of them simply to go out of business.

For the reasons enumerated herein, these new rules will cause severe economic hardship on small and medium-sized carriers and customers; therefore, expedited consideration is not only justified but necessary. Not reconsidering the order on an expedited basis will allow these discriminatory and costly rules to commence their destruction of competitive telecommunications in less than five months. Accordingly, ACTA requests that the Commission instead adopt a multi-line business PICC priced at the same rate as the residential PICC ($0.53 per line), mandate the pricing of tandem switching at a standard based on forward-looking economic cost and preserve the unitary rate structure for tandem-switched transport users.

II. ARGUMENT

A. The Commission Should Reconsider Its Order Because It Did Not Conduct a Proper Analysis Under the Regulatory Flexibility Act.

The Commission should reconsider its Order because it did not conduct a proper analysis of how its rules would harm small businesses. As part of the Contract With America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847 (1996), Congress enacted the Small Business Regulatory Enforcement Act of 1996. This Act amended the Regulatory Flexibility Act, 5 U.S.C. §§ 601-612 ("RFA"), to require agencies to make preliminary and then final "regulatory flexibility analyses"on whether an agency's rules have a significant economic impact on a substantial amount of small entities which includes, *inter alia*, small businesses. 5 U.S.C. §§ 601-612; see also Funk, *More Stealth Regulatory Reform*, Administrative & Regulatory Law News, 1-2 (Summer 1996).[1] Under the 1996 amendment, agency compliance with the RFA's requirements was made fully subject to judicial review under the Administrative Procedure Act. In addition to remanding the rule to the agency, a court can also defer enforcement of the rule against small entities "unless the court finds that continued enforcement of the rule is in the public interest." 5 U.S.C. § 611(a)(4)(b); Funk, *supra.*

The Commission should reconsider the regulatory flexibility analysis it conducted in its Order, or risk a judicial stay. The Commission states in the Order's Final Regulatory Flexibility Act Analysis section that its adoption of a new tandem-switching rate structure should "reduce and

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[1] Under the original version of the RFA, agency determinations and analyses under the Act were exempted from judicial review. As a result of this exemption, both agencies and courts widely ignored the Act. *See, generally, Mid-Tex Electric Cooperative, Inc. v. FERC*, 773 F.2d 327 (D.C. Cir. 1985) and its progeny.

minimize uncertainty" for small businesses. First Report & Order, ¶ 433. The Commission adds that since the rate structure and rate levels "are more closely related to the costs of providing the underlying services" this should "minimize the economic impact of these rules on small businesses . . . by minimizing the adverse impacts that can accompany non-cost based regulation." *Id.*

The Commission's analysis fails to recognize the vast and disproportionate cost that will be borne by small carriers as a result of the new tandem switching rate structure. As a result of long-standing Commission policy, small interexchange carriers depend on tandem routing much more that larger carriers. Simple math reveals that the Order will increase tandem switching rates by 400% *after* any "offsetting" access rate reductions. Thus, small carriers will be forced to pass on these higher rates to their customers. Such enormous price increases will exacerbate competitive disadvantages between small and large carriers, and cause a loss of traffic from the tandem-switched option. Such a brutal blow to the competitive IXC community is clearly inconsistent with the pro-competition mandates of the Telecommunications Act of 1996 and the ostensible policies of the Commission itself.

The Commission's new rate structure hurts small businesses further by also failing to meet the goal of cost-based pricing that underscores the Telecommunications Act. The current tandem switching rates are a fairly close approximation of the forward-looking costs of tandem switching. However, the proposed rates bear little relation to actual economic costs as they are based on embedded cost loadings. Direct trunk routing, however, is spared these embedded costs, and, thus, more closely reflects actual costs. Therefore, direct trunk routing will become the more attractive option for consumers to the detriment of smaller carriers offering tandem-switched

routing. In short, the Commission's capricious and arbitrary pricing differential between tandem switching and direct trunk routing not only flies in the face of Congress' intent to foster equitable and rationally priced telecommunications competition as embodied in the 1996 Act, it violates the RFA by needlessly harming small businesses as well.

The situation is compounded by the Commission's destruction of the unitary rate structure where IXCs are allowed to pay a single per-minute rate for end-to-end tandem-switched transport transmission. Long distance carriers will now be forced to purchase tandem-switched transport pursuant to an inflated and irrationally priced partitioned rate structure. Such government mandated artificial pricing will also greatly increase the cost of tandem-switched transport as carriers will now have to pay two sets of fixed charges. Now, small IXCs also must pay airline mileage according to the actual routing of the call, no matter how circuitous it may be, as opposed to paying airline mileage between the end-office and the serving wire center. Once again, since small carriers are the predominant users of tandem-switching, they will be placed at a competitive disadvantage against the likes of AT&T. The Commission offers no credible RFA analysis of this disparity in its Order.

Consumers also will be greatly affected by this new rate structure, particularly rural and suburban customers. Much of rural and suburban long distance service is via tandem-switched transport. The staggering rate increase of this service will draw many carriers out of the rural and suburban market leaving fewer choices for these customers. The few carriers that remain may impose pricing structures such as mandatory charges that will significantly increase rates. As a result, the mantra of competition which the Commission espouses, and the 1996 Act emphasizes, greatly suffers, as will consumers.

In *Thompson v. Clark*, 741 F.2d 401 (1984), the U.S. Court of Appeals for the D.C. Circuit was called upon to apply the earlier version of the RFA and held:

> Thus, if data in the regulatory flexibility analysis -- or data anywhere else in the record -- demonstrates that the rule constitutes such an **unreasonable assessment of social costs and benefits as to be arbitrary and capricious**, 5 U.S.C. § 706(2)(A), **the rule cannot stand.**

Id. at 405 (emphasis added). The D.C. Circuit added:

> **if a defective regulatory flexibility analysis caused an agency to underestimate the harm inflicted upon small business to such a degree that, when adjustment is made for the error that harm clearly outweighs the claimed benefits of the rule, then the rule must be set aside.**

Id. (emphasis added).

The Commission must reconsider its RFA analysis in regard to the effect of its new tandem-switched rate structure on small carriers. The Commission has underestimated the harm that will be inflicted upon these small businesses. It imposes a tremendously disproportionate regulatory burden on small carriers by giving a *de facto* cost subsidy to direct trunk transport over tandem-switching. Small carriers will lose traffic to larger carriers resulting in threats to their economic viability and further competitive disadvantages. Additionally, the goals of competition and cost-based rates, which are allegedly the benefits of this new rate structure, are frustrated by the rate increase.

The PICC also threatens a vital market segment for small carriers. As discussed *supra*, many small carriers target multi-line businesses as customers. Now, small carriers are faced with a "Catch-22" situation in regard to their options to compensate for the increased costs incurred as a result of the PICC. They are faced with either raising their calling rates or absorbing the higher costs. The former option will surely result in a loss of customers to the larger IXCs who can afford to amortize the PICC over more minutes of use thereby increasing their ability to

absorb the costs. If the small carriers attempt to absorb the costs of the PICC, they place in jeopardy their already perilously thin profit margins, and, as a result, many will be forced to go out of business.[2]

Once again, the Commission must examine whether its regulatory approach truly comports with the goals of the Telecommunications Act and the RFA, and determine whether the purported benefits of the approach are actual and real. The multi-line business PICC bears no relation to access costs caused by such customers. Costs caused by multi-line business users are already fully recovered through the multi-line Subscriber Line Charge. Thus, the PICC is a non-cost based charge that ends up serving as an implied subsidy to local exchange carriers in defiance of the 1996 Act.[3]

Furthermore, the competitive market that the Commission seeks to perpetuate will cease to become a reality if small carriers are forced out by artificial and discriminatory pricing. The Commission should beware of upsetting the tenuous balance of forces that makes the interexchange market the vibrant competitive entity that it is. It is no coincidence that the tremendous growth of small carriers in the last fifteen years has helped give the consumer numerous, viable choices for their long distance service. The Commission should avoid adopting rules that would disproportionately burden small carriers and threaten their economic viability.

Congress, in enacting the Regulatory Flexibility Act, clearly recognized that small businesses are vital players in a fully functioning competitive market. Congress added teeth to the Regulatory Flexibility Act to ensure that agencies do not merely pay lip service to its

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[2] Multi-line business users also will be adversely affected by the PICC, particularly those multi-line businesses with relatively low interstate calling volumes per line (i.e., *small* businesses).

[3] See 47 U.S.C. § 254(e).

language, but, rather, actively ensure that small businesses are not disproportionately affected. The Commission must reconsider its determination in the area of the tandem-switching rate structure and the PICC charge because both measures pose significant harm to small carriers and the benefits of the measures do not outweigh the harm. The Commission needs to consider the viable alternative approaches discussed *supra* that ensure a fair and equitable distribution of the regulatory burden.

B. The Commission's Order Violates Section 202(a) of the Communications Act Because It Mandates Discriminatory Pricing.

This same discriminatory pricing regime violates Section 202(a)[4] of the Communications Act by mandating carriers to make unjust and unreasonable discrimination in charges, practices, classifications and services in connection with "like" communications service. In regard to the PICC, there is no cost basis to establish a higher PICC for multi-line business customers than for single-line residential and business customers and second-line residential customers. Without a rational basis, such a differential is nothing more than pure discrimination. There is also no functional difference between transport provided as a network element and transport provided as an interstate access service -- yet the former is priced based on economic costs, while the latter is priced on embedded costs.

These different approaches unduly discriminate against small carriers who bear the brunt of these supposed "reforms," while not reaping any benefits. Small carriers are similarly situated to large carriers but are being subjected to higher rates for access services. This disparate treatment is wholly unjustified, unreasonable and contrary to the law.

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[4] 47 U.S.C. § 202(a).

C. The Commission's Disparate Treatment of Similarly Situated Carriers Violates the Constitution's Equal Protection Clause.

This discriminatory treatment afforded to small carriers also violates the Equal Protection Clause of the U.S. Constitution. The Equal Protection Clause requires that "all persons similarly situated should be treated alike" and that any classifications drawn should be "rationally related to a legitimate state interest." *City of Cleburne, Texas v. Cleburne Living Center*, 473 U.S. 432 (1985); *see also* U.S. CONST. amend. XIV, § 1. These constitutional guarantees have been held applicable to corporations. *Grosjean v. American Press Co.*, 297 U.S. 233, 244 (1936); *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925).

As discussed above, both the tandem-switching rate structure and the PICC charge represent arbitrary and irrational classifications that disproportionately encumber small carriers. There is no rational basis for small carriers to bear a different proportionate cost than large carriers, especially given the more equitable alternatives available to the Commission. The Commission's proposed policies will adversely affect small carriers to the benefit of large carriers. This distinction is not rationally related to the statutory obligations under the Telecommunications Act of 1996, and, in fact, run directly counter to said obligations. Accordingly, the Commission should reissue pricing schemes that are rationally priced and non-discriminatory.

III. CONCLUSION

For the reasons enumerated above, ACTA strongly urges the Commission to reconsider its order and adopt new rules. ACTA proposes that the multi-line business PICC be reduced to the proposed level of the residential PICC, or $0.53 per line. Furthermore, the Commission should adopt a usage-based charge in a competitively neutral manner to recover any cost-based revenues that may be lost as a result of a reduction in the multi-line business PICC. Lastly, the

Commission should mandate the pricing of tandem switching at a standard based on forward-looking economic cost and preserve the unitary rate structure for tandem-switched transport users.

Respectfully submitted,

AMERICA'S CARRIERS
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CERTIFICATE OF SERVICE

I, Michele Grasse, a secretary in the law office of Helein & Associates, P.C., do hereby state and affirm that copies of the foregoing "Petition For Expedited Reconsideration," CC Docket Nos. 96-262, 94-1, 91-213 and 95-72, were served via hand delivery this 11st day of July, 1997, on the following:

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